

**TOWN OF CUSHING**  
**PLANNING BOARD**  
**Minutes of Meeting**  
**September 6, 2006**

**Board Present:** Bob Ellis, Evelyn Kalloch, Frank Muddle, Dan Remian, PB Attorney Lee Bragg, CEO Scott Bickford and Secretary Deborah Sealey

**Board Absent:** Arthur Kiskila

**1. Call to Order:** Chairman Remian called the meeting to order at 7:00 pm and a roll call was taken.

**2. Minutes of 8/2/06:** The members asked for three minor corrections to the minutes of the 8/2/06 meeting.

**ACTION:** Mr. Muddle made a motion, seconded by Mrs. Kalloch, to accept the minutes of the 8/2/06 meeting as corrected.  
Failed 2-0-2 (Mrs. Kalloch and Mr. Ellis abstained)

**ACTION:** Mrs. Kalloch made a motion, seconded by Mr. Muddle, to table the minutes until the next meeting.  
Carried 4-0-0

**3. Correspondence:** Chairman Remian said the PB had received a letter from Jane and Joe Daven of Boxford, MA, requesting relief from the moratorium on subdivisions. Mr. Remian said he had spoken with the town attorney, who said nothing could be done for the Davens until the moratorium ended. Mr. Remian noted a letter from James Tower, concerning Lot 26, which would be taken up later. Finally, there were two letters from Mr. Cardon, one to the PB and one to MDOT.

**4. Land use application for a building permit, Map 6, Lot 14 in Gaunt Neck, owned by Jim and Jane Nyce. Application presented by John Cole, architect:** Mr. Cole presented a package containing a survey, site plan and architectural drawings for two proposed buildings, a residence and a summer cottage. He stated that the property owners had been summering in Cushing for eighteen years and wanted to retire here. Mr. Cole said there were no slopes exceeding the requirements of the Shoreland Zone Ordinance [SZO] within the proposed building envelope; construction would also avoid a historical site on the property.

Mr. Cole said the main building would contain 3 or 4 bedrooms, while the cottage would have 1 bedroom and a sleeping loft. Doug Meservey had designed a subsurface waste disposal system to serve both buildings. Mr. Cole said the well would be located between the two buildings, though it would be moved back if the drilling hit salt water.

Mr. Ellis asked if the site had been cleared and Mr. Cole said it was void of any vegetation and contained very few trees. Mr. Ellis also ascertained that the guesthouse would most likely have a crawl space rather than a full foundation. The builder, Steve O'Brien, told Mr. Ellis there would be no grading into the 75' setback. Mr. Remian said a greater setback for elevation might be required due to the floodplain. Mr. Cole said this had been taken into consideration.

Mr. Remian led discussion of Section 15 (Land Use Standards) of the SZO, during which the Board made the following determinations: 15A was satisfied because the lot was in an approved subdivision; 15B was satisfied because all access structures were set back 80'; 15C, 15D & 15E were not applicable; 15F was satisfied since the parking area was setback 155' to 200'; 15G - Mr. Cole said there were no slopes greater than 20% in the build area; 15H was not applicable; 15I, Mr. Cole said silt fencing would be used for berm construction; 15J, 15K, 15L, 15M and 15N were not applicable; 15O - Mr. Cole said the trees had been cut long ago and there would be no further cutting on the site. 15P - Mr. Ellis asked the CEO if he would visit the site to see that sedimentation controls were being used and Mr. Bickford replied that he would check to see that best management practices were used. In response to a question from the chairman, Mr. O'Brien said that all soil would be left on the site; 15Q - Mr. O'Brien said he was unsure if it would be necessary to blast; Mr. Remian read aloud subsection 15R; 15S - Mr. Remian asked Mr. Cole the significance of the historical site on the property. Mr. Cole said it was an old foundation that

would not be disturbed. Mr. Tower confirmed to the chairman that he had preserved that area on his subdivision plan; 15T was not applicable.

**ACTION:** Mr. Ellis made a motion, seconded by Mrs. Kalloch, that the Board finds a positive finding of fact on all land use subsections that apply in Section 15 of the Shoreland Zone Ordinance.  
Carried 4-0-0

Mr. Remian referred the members to Section 16(E)(3) of the SZO and read aloud items (a) through (i). He asked the members how they found and Mrs. Kalloch said this had already been covered in the previous discussion.

**ACTION:** Mr. Ellis made a motion, seconded by Mrs. Kalloch, to make a positive finding of fact, based on information presented, that the submission met the conditions of Section 16(E)(3)(a-i).  
Carried 4-0-0

**ACTION:** Mr. Ellis made a motion, seconded by Mr. Muddle, to approve the permit.  
Carried 4-0-0

**5. Land use permit for Lot 26, Map 5. James Tower, Cushing Holdings, LLC:**

**ACTION:** Mr. Remian made a motion, seconded by Mr. Ellis, to go into Executive Session under Title I, Section 406(6)(E) to consult with the PB attorney as to this body's legal rights and duties concerning this application.  
Carried 4-0-0

*Executive Session began at 7:35 pm and the meeting reconvened at 8:35 pm.*

Chairman Remian explained that the Board had gone into executive session because it was concerned that applicant James Tower was not licensed and had no certified surveyor's stamp on any of the plans submitted to the Town of Cushing and the DEP. He said the Board had received several letters asking that the application be denied on that basis. Mr. Remian said he did not see what such a denial would accomplish and asked the Board to present a motion for further direction. Mr. Remian said he believed Mr. Tower had perpetrated a misrepresentation and had wasted the Board's time; he was appalled that this requirement of the subdivision regulations was not met. He asked the Board how it wanted to go forward and Mrs. Kalloch asked if Mr. Tower should submit a new application. Mr. Remian said that could be done, though the current application would have to be reconsidered because it had been confirmed complete. Mr. Muddle commented that this would require a new submittal, against which there was a moratorium in effect. Mr. Ellis said the applicant must comply with the provisions of the SZO requiring a surveyor's stamp and a valid engineer's license. Mr. Muddle stated that the applicant had repeatedly introduced himself as a licensed engineer over the past three years and had submitted documents with his stamp, so it had been natural for the PB to accept his stamp as valid. Now the Board had learned that Mr. Tower's license had lapsed and was not reinstated until July 2006. Mr. Muddle said that challenges could tie things up for a long time; he thought the PB should find the application incomplete and require re-submittal. CEO Bickford said he did not feel that a surveyor's stamp was required on documents and Mr. Ellis agreed. Mr. Bickford clarified that the registered plan did require the surveyor's stamp.

Mr. Ellis interjected to disclose a possible appearance of conflict. He said he had accepted an invitation to supper from Mr. Tower a couple of weeks ago. He said it was in his nature to be neighborly but he assured the Board that he intended to represent the town, follow the regulations to the letter and treat every applicant the same. Mr. Ellis said the MMA manual suggested the Board take a vote if there was the appearance of bias by a member. The chairman thanked Mr. Ellis for his disclosure.

**ACTION:** Mr. Muddle made a motion, seconded by Mrs. Kalloch, to have the Board vote on the question of conflict of interest.  
Carried 3-0-1 (Mr. Ellis abstained)

**ACTION:** Mr. Remian made a motion, seconded by Mrs. Kalloch, that Mr. Ellis not be asked to recuse himself because he had demonstrated in the past that he treated both applicants and the town fairly.  
Carried 3-0-1 (Mr. Ellis abstained)

Wayne Crandall introduced himself as Mr. Tower's attorney. He said he had been informed that the application for both the addition of Lot 26 to the MPS and the RMS had been submitted at a time when Mr. Tower had been

reinstated and was a licensed engineer in the State of Maine. Mr. Crandall said that Mr. Tower would certainly be licensed when the final plan was presented, obviating any problems that may have existed due to technical disqualification or Mr. Tower's status. Mr. Crandall then stated that to require returning to square one due to a technical question would certainly generate some unnecessary and probably inappropriate litigation. He said that Mr. Tower could now sign any of the documents in his capacity as a professional engineer. Mr. Crandall said he also understood that Drew Grenier had performed surveying services in connection with this application, the survey and plan of which he had signed and stamped. He encouraged the Board not to take this "drastic measure of rejecting the pending applications on this very technical and easily corrected error."

Chairman Remian responded that, based on testimony at the public hearing, Mr. Tower was not a registered engineer in the State of Maine when he submitted some of these applications. Mr. Remian said a letter from the Registry of Professional Engineers documented that Mr. Tower had not been licensed between December 2005 and July 2006. Mr. Remian said the PB also faced possible litigation from abutters who had disclosed these facts; the PB was caught in the middle. Mr. Crandall responded that, to the extent that Mr. Tower could demonstrate that any applications currently pending before the Board had been made when he was licensed, those applications should be honored. Mr. Crandall said rejecting the pending applications because possibly one of the three items before the Board tonight had been submitted when Mr. Tower was not a registered engineer could not be justified.

Mr. Ellis pointed out that all three of Mr. Tower's applications on tonight's agenda were submitted between January and July 2006. CEO Bickford said that all items on the agenda did not require the stamp of an engineer. Mr. Crandall said the Lot 26 application was submitted after Mr. Tower was reinstated and Mr. Ellis responded that the Lot 26 application did not require an engineer's stamp. Mr. Crandall agreed and said he could find nothing in the ordinance that required the stamp of a registered engineer for any of the applications. CEO Bickford said that the SZO did not require the stamp but the Subdivision Regulations [SR] did, under Subsection 5.4(C). Mr. Muddle sought clarification and was told the Board was speaking specifically about the two subdivision items (#3 & #4) on the agenda. Mr. Ellis said the PB needed clarification from attorney Bragg on this point as the SR referred to "another qualified person". He wondered if the Board had to make a motion to revisit completeness first. Mr. Bragg said the PB could revisit completeness due to a question of compliance with Regulation 5.4(C), discussing whether there was significant failure on that point. Mr. Muddle read from the section referred to, "The Plan shall be done by a licensed land surveyor or another qualified person using information from a field survey made by a certified and licensed land surveyor, whose seal and signature shall be affixed to the Plan." Mr. Muddle said the documents in question did not have a licensed land surveyor's seal and signature. Mr. Bickford pointed out that they did have the seal of a professional engineer and said the question was whether that fulfilled the obligation in place of material presented by the licensed land surveyor. Mr. Ellis asked if he correctly interpreted that to mean that, even if the engineer were qualified and certified it wouldn't matter whether his license had lapsed (according to Cushing's regulations) if the seal and signature of the surveyor were not present. Mrs. Kalloch commented that, in this case, the engineer was the developer and the surveyor would have been a sub-contractor under his direction.

Chairman Remian asked Mr. Tower if he would agree to table the items until the next meeting and have the submittals corrected for consideration. Mr. Tower said he recollected that the MPS amendment was submitted to the PB in November 2005, with which the chairman agreed. Mr. Tower said this was an evolving process and the PB had asked for new submittals, which he had provided. He said the lapse in his license occurred simply because he had not submitted continuing education certificates, which was a new requirement for re-licensing. He said he had been busy and overlooked the requirement, though he submitted them when he realized his mistake. Mr. Tower said he felt using his customary introduction was a sin equal to not having made the disclosure that he held multiple titles on each project. He said that, during the time he was unlicensed, his standards had not varied and everything given to the PB had been complete and accurate. Mr. Tower said he couldn't recall when the initial RMS application was brought to the Board, but he was willing to table it, though he would like to discuss some of the issues identified earlier.

Mr. Tower said that most towns identified application issues before the PB meeting. He said coming to Cushing was like walking into a minefield; with other Boards, everyone had the opportunity to work on a resolution before the meeting. Regarding the MPS amendment, Mr. Tower said he thought the application was made earlier. In addition, he said that in three years dealing with the Cushing PB he had never presented any but the final plan with the surveyor's stamp on it. Mr. Tower concluded by saying he would consider tabling Items 3 & 4 if the PB or its attorney could elaborate on the benefit of doing so.

Mr. Ellis asked if he was correct in thinking the deficiency was in the lack of a surveyor's certification on the plans, since an engineer's stamp was not covered by the regulations. Mr. Bragg replied that, had there been a licensed land surveyor involved, Mr. Tower could have been the "other qualified person". In that case, the developer's

lapsed license would not have been an issue; however, he said, there was no licensed surveyor involved on whose information Mr. Tower could depend. Mr. Ellis said it seemed worthy of tabling until that could be corrected. Mrs. Kalloch suggested that Mr. Tower had a surveyor work on the plans. Mr. Tower confirmed this, saying he started with a boundary survey and a surveyor was involved throughout the process. Mr. Tower said he never did his own survey work and noted that, until now, the PB had accepted the surveyor's stamp on the final drawings and had never required it on the intermediate drawings. Mr. Remian said the PB had always assumed Mr. Tower's stamp to mean he had complied with the surveyor's information. Mrs. Kalloch said that, since the MPS application was received in November 2005, the only application in question was that for RMS. Mr. Remian agreed.

**ACTION:** Mr. Muddle made a motion, seconded by Mrs. Kalloch, to table agenda items three and four, giving the applicant time to update the submitted applications with the signature of a licensed surveyor.  
Carried 4-0-0

Mr. Remian said he had a letter from an abutter, asking the Board to take no further action on these items because of a land boundary dispute. He said Mr. Tower's surveyor had acknowledged this ongoing dispute and Mr. Remian said he would like that issue to be resolved before the Board acted on the application. Mr. Ellis noted that the surveyor in question had provided a list of recommendations for Mr. Tower to follow. Mr. Tower said he had followed those recommendations, one of which was not to build anything on disputed land. He said the MPS amendment did not abut what was formerly the Kim Young property; there was a piece of land in between. He pointed this out on the plan and said he had avoided any land that might possibly be included in Mr. Young's land. Noting that Mr. Cardon had bought Young's land, Mr. Tower said he had asked to meet with the new owner after the public hearing but had not heard from Mr. Cardon. Mr. Remian read a letter from Mr. Cardon into the record. Mr. Cardon was also challenging the DOT permit and said there was an error in the road location shown on the first plan. The chairman said he would like to table the associated application until there was clarity on the boundary dispute.

Mr. Crandall said he had been practicing law before planning boards for thirty-five years and there were frequently boundary line disputes, which the PB did not have the authority to resolve. If the Board elected to defer the RMS application pending resolution of the location of boundary lines, the PB would be denying the applicant speedy processing of his application, Mr. Crandall said. He expressed his opinion that boundary issues were a red herring and said he had never known a PB to undertake deciding such issues. He further said that Mr. Tower was basing his plan on the least possible amount of land he would have when the boundary issue was settled. Mr. Crandall concluded by encouraging the PB not to become involved in adjudication. Mr. Muddle said boundary issues could drag on for a long time and he was satisfied that Mr. Tower had demonstrated the most conservative interpretation of the boundary and had kept building areas away from it. Mr. Ellis said that Mr. Tower had asked to be informed of issues before the PB and this was one of them. He said another issue was that the PB was still anxious to see the results of the stormwater application amendment.

Mr. Remian asked Mr. Tower how he would like to proceed with the applications. Mr. Tower said he would like to move forward with the land use permit for Lot 26, but Mrs. Kalloch said that could not be done because the amendment had not yet been approved. The Board agreed that had to be done first. Mr. Ellis said the PB could not approve a subdivision amendment with a road on it until the SZO permit to build the road was addressed. Mr. Bickford said Lot 26 was imperative to an amended plan and, because Mr. Tower did have a completed subsurface wastewater application prior to the moratorium, the application was complete enough that the PB could tell the applicant what was wrong and have it corrected. The CEO said this was one of 36 applications that had an approved subsurface wastewater application. Mr. Tower said that he recollected that the PB had reviewed many of the criteria of this application at the last meeting and had considered it substantially complete. One of the PB members said he remembered that the Board had come up against conflicting opinions about whether the subdivision amendment or land use permit should be dealt with first. Mr. Bickford said the subdivision amendment (to join Lot 26 to MPS) came before the PB and there was a roadway on that plan; consequently, to review the roadway, Lot 26 would first have to be approved as a permitted land use or the applicant could remove the roadway from the subdivision amendment and attach Lot 26 so the subdivision amendment could move forward. Mr. Ellis said that Mr. Bragg had agreed the PB would not be able to approve the subdivision plan because it contained a road through a Resource Protection [RP] area.

The members referred to the minutes of the previous meeting, in particular a motion "to see alternative plans demonstrated by the applicant and to see a copy of the purchase and sales agreement on Lot 10." Mr. Remian said he had received neither, though Mr. Crandall said Mr. Tower had submitted a statement. Mr. Bragg said his review of the minutes suggested that the amendment would be resolved before the land use permit was addressed. Mr. Bickford said Mr. Cunningham had advised the opposite, with which Mr. Ellis agreed, at the last meeting. The

CEO said that, otherwise, the applicant would have to remove the roadway from his amended plan because there was no need for it. Mr. Ellis said the only decision had been to see alternate routes and the sales agreement; he thought that should be discussed.

The PB agreed to look at the changes required to the application. Mr. Remian noted that the map and lot numbers were incorrect and Mr. Bickford confirmed that they should be Map 6, Lot 9, instead of Map 5, Lot 84, respectively. The PB also said Item 6 of the application should read "roads and driveways". The chairman then led a review of Section 15 (Land Use Standards) of the SZO. The Board was satisfied with subsection 15A; 15B(1) was satisfied; 15B(2) there was no indication of structure height, but it must be less than 35'; 15B(3) and 15B(4) complied; 15B(5); 15C, 15D and 15E were not applicable; 15F - there was no parking area on the plan; 15G(1) - Mr. Remian asked the applicant what he would provide to prevent sedimentation and soil erosion. Mr. Tower responded that there would be no soil and only rock would be left. All of the topsoil and stumps would be gone and the ditch would be bedrock, with the interior rip rapped. He would also remove soils and build a berm from an erosion control mix. Mr. Ellis said discussion of Subsections 15G(2) and 15G(4) could not occur until the applicant provided alternate routes. He said a letter from Mr. Tower showed A, B and C as alternate routes and Mr. Tower confirmed that was submitted to satisfy the Board's request at the last meeting. Mr. Ellis said all three routes were inside the RP area and Land Use Table #1 required alternate routes to be outside RP. Mr. Tower said that was not how he interpreted Line 26 of that table. Mr. Ellis then read aloud, "...where no reasonable alternative route or location is available outside the RP, in which case a PB permit is required." Mr. Ellis said the alternate route referred to at past meetings was through Lot 10, which none of these was.

Mr. Crandall said the subdivision regulations, specifically Article VI, Section 6.3 stated that review was limited to those parts of the plan proposed to be changed. Therefore, he said, the PB could not now revert to the MP development and propose a change to Lot 10 because the applicant was asking for a review of Lot 26 only. Mr. Ellis said he had earlier asked Mr. Bragg if Section 6.3 limited the SZO review considerations for an alternate route to the portions of the subdivision plan proposed to be changed. Mr. Bragg confirmed that his answer had been no because the Board could make a reasonable inquiry into alternate routes. Mr. Ellis stated that several times between April and June the PB had asked that an alternate route through Lot 10 be explored; none of the three alternates provided by Mr. Tower was through Lot 10. He said that an alternate route through Lot 10 would require definition of the RP boundary within that lot, which the PB still did not have. Mr. Remian noted that Mr. Baker of DEP had also suggested a route through Lot 10 would have less impact and could possibly be located outside RP.

Mr. Muddle said the application was to amend the subdivision by adding Lot 26. Mr. Bickford disagreed, saying the PB was not looking at Lot 26, but rather a long strip of land that went all the way to Pleasant Point Road. He said Lot 26 should be removed because it did not exist. Mr. Ellis said there was, however, an approve Lot 10 and the Board had several times asked to be supplied with an alternate route. Mr. Muddle suggested another site visit, but Mr. Remian said he did not think it was the Board's job to design the alternate route, with which Mr. Bragg agreed. The chairman said the alternate routes provided by Mr. Tower did not satisfy the PB's request. Mr. Muddle said he felt the application should be tabled until the PB got the information it had requested on several occasions to answer the question raised by Section G of the Land Use Standards. Mr. Ellis said he had asked Mr. Bragg if, since the request for an alternate route to Lot 26 through Lot 10 had occurred before the sale of Lot 10, the pending sale circumvented the intent of the ordinance. He wanted the PB to discuss whether it was compelled to deny a road permit if it was determined to be outside RP. Mr. Remian said the Board had asked for two things and they had not been provided. Mr. Ellis said RP on Lot 10 still needed to be determined; if it were determined to be in RP, then the least invasive route through Lot 26 would be allowed.

**ACTION:** Mr. Muddle made a motion, seconded by Mrs. Kalloch, that this item be tabled until the information concerning the alternate route for access to Lot 26 was clarified per our previous request.  
Carried 4-0-0

Mr. Muddle said Mr. Tower's complaint about communication with the Board bothered him. He said he did not think the Board members were responsible for communicating their needs to the applicant. He expected the CEO to do that and said dialogue between the Board and applicant should be through the CEO.

Mr. Tower said he was aware of what the Board had been asking in regards to an alternate route through Lot 10. He stated that the Board did not have the right to force a road or a driveway through a lot in a previously approved subdivision. Mr. Bickford responded that the Board was not making a requirement, but rather requesting more information so they could make a sound judgment. Mr. Tower said even if there were a route with less impact he still questioned whether the Board could force a road over a sovereign piece of land. Mr. Remian responded that

Mr. Tower had amended his subdivision many times to take advantage of better routes, positioning and the addition of lots and this would basically be the same thing. Mr. Tower said that was not what his application was asking. Mrs. Kalloch said the idea of an alternate route through Lot 10 was a suggestion and she did not think the Board was trying to force it. Mr. Remian agreed, saying it was DEP that had suggested a route across Lot 10. Mr. Tower said he had looked at the possibility before bringing the amendment before the Board. Mr. Muddle said Mr. Tower had to show the Board that there was or was not an acceptable alternate route. Mr. Tower then reviewed the three alternatives he had suggested. Mr. Bragg said the issue was that the ordinance said the Board could not approve an access through RP unless there was no reasonable alternative outside RP. The thought was that Mr. Tower had the legal and practical ability to provide an alternate route across Lot 10 was the nature of the inquiry. Once the Board had the necessary information, the attorney said, it could make a decision. Mr. Tower said he did not think it "reasonable" to consider a roadway across an approved subdivision lot that had substantial value. Mr. Bragg said the Board was beyond that and was of the mind that you could consider the possibility of an alternate route across adjoining land, regardless of the fact that land had been the subject of subdivision approval. Mr. Muddle said Mr. Tower had opened the door of the subdivision approval by amending it. Mr. Tower said the Board was limited to consideration of the amendment only.

**6. Adjournment:** Mrs. Kalloch made a motion, seconded by Mr. Muddle, to adjourn the meeting at 10:48 pm.  
Carried 5-0-0

Respectfully submitted,

Deborah E. Sealey